(1)

91-1147

No.

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

STEVEN GNATOVICH,

Petitioner,

vs.

STATE OF OHIO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

Robert G. Schultz, Jr.
Counsel of Record
123 B Greenwich Road
Seville, Ohio 44273
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QUESTIONS PRESENTED

1. Whether Ohio Revised Code Section 4511.19(A)(3) is being applied in a discriminatory manner, is discriminatory in its application, and contravenes the Fourteenth Amendment to the United States Constitution.

2. Whether the trial court, the appellate court, and the Supreme Court of Ohio denied petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution by ignoring the constitutional issue raised at all levels.

PARTIES TO THE PROCEEDING

The petitioner is the defendant and appellant below.

The respondent is the plaintiff and appellee below.

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TABLE OF AUTHORITIES

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Other:

Forensic Science, Second Edition, Geoffrey Davies, Editor, American Chemical Society, Washington, D.C., 1986 7

Journal of Forensic Sciences, Vol. 34, July, 1989, pp. 836-841 9

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No.

STEVEN GNATOVICH,

Petitioner,

--against--

THE STATE OF OHIO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Steven Gnatovich petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The opinion of the court of appeals is unreported as is the opinion of the Ohio State Supreme Court.

JURISDICTION

The judgment of the Ohio Ninth District Court of Appeals affirming the trial court's decision was entered on June 5, 1991.

The decision of the appellate court was appealed, and on October 23, 1991, The Supreme Court of Ohio overruled the petitioner's motion to certify. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in pertinent part:

> No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 3701.143 states:

> The director of health shall determine, or cause to be determined, techniques, or methods for chemically analyzing a person's blood, urine, breath, or other bodily substance in order to ascertain the amount of alcohol in a person's blood. The director shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing them to perform such analyses. Such permits shall be subject to termination or revocation at the discretion of the director.

Ohio Revised Code Section 4511.19(A)(3) states in pertinent part:

> No person shall operate any vehicle ... if... the person has a concentration of ten-hundredths of a gram or more by weight of alcohol per 210 liters of his breath ... Such bodily substance shall be analyzed in accordance with methods approved by the director of health...

Ohio Administrative Rule 3701-53 is too voluminous to recite but is included in the appendix.

STATEMENT OF THE CASE

Ohio Revised Code Section 3701.143 provides that breath tests administered to defendants in drunk driving cases in Ohio conform to the provisions of Chapter 3701-53 of the Ohio Administrative Code (OAC). Ohio is a per se state meaning that results of breath testing devices may not be questioned at trial. The problem is that the Ohio Administrative Rules do not comport with scientific reality and, in that sense, are discriminatory toward and against certain classes of people contrary to the Fourteenth Amendment to the United States Constitution.

In explanation, we cite the following numbered issues of discrimination:

1. OAC 3701-53 does not include any requirement for two-breath sample testing.

Due to the possibility of false high breath alcohol concentration (BAC) readings as a result of belching and other transient potential problems, a number of other states have recognized the appropriateness of requiring a two-breath sample test procedure. False elevations in the BAC reading can occur even with approved breath testing instruments, such as the BAC Verifier. This two-breath sample testing is advocated by Department of Transportation chemist Arthur L. Flores, Ph.D. State v. Cavin, #34089/4218774, Washington District Court, Thurston County, 1987. Duplicate analysis for purposes of cross-checking to eliminate error and demonstrate precision also has been advocated in print by Leonard J. Porter, Chief, Alcohol Testing Program, Ohio Department of Health,

(page 204, Chapter 14, "Forensic Breath-Alcohol Analysis" by Leonard J. Porter, in FORENSIC SCIENCE, Second Edition, Geoffrey Davies, Editor, American Chemical Society, Washington, D.C., 1986).

The adoption of a two-breath sample testing procedure by the Ohio Department of Health would put Ohio in conformity with both general scientific procedures for analytical methodologies and in conformity with other states which already have such procedures.

2. OAC 3701-53 does not include any requirement for removal of dentures prior to the required 20-minute observation period.

The Colorado Department of Health has conducted experiments which provide convincing evidence that at least one brand

of dental adhesive has the ability of trapping and retaining ethanol well beyond the 20-minute observation period. The alcohol trapping and retention ability of the dental adhesive resulted in false elevations in the breath alcohol readings. The Colorado Department of Health study concluded that dental adhesives were to be considered a foreign object and that dentures were to be removed prior to an evidential breath test. Since the presence of dental adhesives of any type in the mouth has the potential to interfere with the accuracy of the breath test, the simple policy of removing dentures from the mouth prior to the 20-minute observation period would be a prudent requirement. Jurisdictions which do not require removal of dentures prior to a breath test may be obtaining inaccurately high results.

Now that reliable experimental results have demonstrated that breath alcohol test results are subject to error without the removal of dentures, it is time for the Ohio Department of Health to adopt rules requiring removal of dentures prior to the 20-minute observation period.

3. OAC 3701-53 does not include any requirement that the body temperature of the subject be taken and recorded during the 20-minute observation period.

Published research in a recognized authoritative journal (G.R. Fox and J.S. Hayward, "Effect of Hyperthermia on Breath-Alcohol Analysis", Journal of Forensic Sciences, Vol. 34, July, 1989, pp. 836-841), has recently provided additional evidence that clearly demonstrates and confirms the scientific principle that body temperature directly influences the

true blood alcohol to breath alcohol ratio. The fixed ratio of 2100 to 1, utilized by breath alcohol testing instruments, is an estimated average value based upon normal body temperature (37 degrees C). Test subjects with elevated body temperatures (due to fever or other causes) will have significantly elevated breath alcohol readings in comparison to their corresponding blood alcohol levels. Mildly elevated body temperature (2.5 degrees C increase above normal) have caused as much as a 23 percent increase in the breath alcohol concentration above the corresponding blood alcohol concentration. Such studies have led to the recommendation that mouth temperature be measured before breath sampling to screen for abnormal body temperature and to allow for

potential use of "temperature correction factor". Future breath alcohol testing instruments could provide automatic temperature compensation mechanisms by measuring both breath temperature and the apparent breath alcohol concentration. Until the time such instruments become routinely available, subjects with abnormal body temperatures could undergo blood alcohol testing or manual correction of their apparent breath alcohol level results. The recommended "temperature correction factor" would reduce the apparent breath alcohol concentration by a factor of 8.6 percent for each degree C above normal body temperature. For example, a subject with a 2 degree C fever would have an apparent breath alcohol concentration of 0.110 gm/210 L when his corrected breath alcohol concentration should be 0.094

gm/210 L (corresponding to a blood alcohol concentration of 0.094 gm/100 mL).

The adoption of a requirement for taking and recording a subject's body temperature during the 20-minute observation time would permit the calculation, if needed, of a temperature-corrected breath alcohol concentration which would accurately represent the subject's true blood alcohol level.

4. OAC 3701-53 does not require a disclaimer on the intoxilyzer test report forms or the machine itself specifically stating that intoxilyzer test results are subject to error due to the subject's prior exposure to lacquer, paint thinner, or other organic solvent vapors.

Published reports by recognized forensic authorities (Randall C. Baselt et al.: "Intoxilyzer Interference by Solvents,"

Journal of Analytical Toxicology, Vol. 10 May/June, 1986, page 125 and "Lacquer Fumes and the Intoxilyzer," Journal of Analytical Toxicology, Vol. 12, May/June, 1988, page 168) have demonstrated that both the Intoxilyzer Model 5000 and the Intoxilyzer Model 4011AS produced falsely elevated "alcohol" breath readings when subjects were exposed to lacquer, paint thinner, and other organic solvent vapors.

5. OAC 3701-53 fails to allow for or correct discrimination against the varied physiologies of subjects against whom O.R.C. 4511.19(A)(3) is sought to be enforced nor does it provide protections against the anomolies of the breath testing devices used in Ohio.

It is well known that the breath/blood ratios in the population can vary from 800/1 to 7000/1, that cardio-

pulmonary factors are involved and not compensated for in the machine testing, that persons with a fever will test up to 30 percent higher on a BAC than those without, that the Intoxilyzer measures lacquers and solvents, among other things, in the .038 micron range, that men have a greater percent of body fluids than women, thereby creating differing breath and blood levels for persons of the same weight taking identical timed doses thereby unfairly discriminating against women.

Denture users are discriminated against because the Department of Health standards fail to prescribe removal of same for 20 minutes prior to the test using breath testing devices. There is no provision for taking two tests to determine whether the breath alcohol

level is ascending or descending from the time of driving; no provision is made for the taking of the subject's temperature prior to testing.

The legislature has attempted to rewrite the laws of nature by ignoring the gap between the physiology of the measurement of alcohol and the instrument technology. It further has neglected to incorporate procedural and substantive safeguards against discriminatory and fallacious measuring techniques by refusing to recognize scientific reality in failing to provide for:

a) Two-breath sample testing;

b) Removal of dentures 20 minutes before testing;

c) Provision for the taking of body temperature during the 20-minute observation period;

d) Provision to insure against Intoxilyzer test result error due to subject's prior exposure to lacquer, paint thinner, and other organic solvent vapors;

e) The partition rate assume by the breath testing machine manufacturers and the legislature to be 2100/1 is patently unfair to members of the public having ratios of 800/1 to 2050/1 and flies in the face of known scientific fact;

f) Women are being discriminated against due to the fact that men have more bodily fluid per pound than do women thereby building discriminatory error into the Ohio Department of Safety's publication concerning the relationship between ounces of alcohol consumed and body weight;

g) The condensation effect, breath temperature, gas distribution in the lungs, breathing patterns, and the partition ratio, all scientifically known to affect breath testing devices causing error in estimating blood alcohol levels, have been ignored by the Ohio legislature.

At all adjudicatory stages of these proceedings, the petitioner has presented expert witnesses proving without contradiction that O.R.C. 4511.19(A)(3) is discriminatory in its application.

The Wadsworth Municipal Court, the Ninth District Court of Appeals, and The Supreme Court of Ohio are guilty of violating the Due Process Clause of the Fourteenth Amendment because they <u>never</u> addressed the constitutional issue proposed and supported by uncontroverted scientific evidence, to wit: the law discriminates against specific

classes, such as persons with a fever, persons working with organic solvents, persons with dentures, women, persons with blood/breath ratios greater or less than 2100:1, persons subject to the spiking effect due to the one-test-only procedure.

Proceedings Below

On April 9, 1990, a motion to dismiss a charge of driving with a prohibited breath alcohol level was filed in the Wadsworth Municipal Court alleging that Ohio Revised Code Section 4511.19 (A)(3) was being applied in a discriminatory manner and that the Ohio per se breath/alcohol offense is discriminatory in its application and contravenes the Fourteenth Amendment to the United States Constitution. This motion was tried to the trial court June 27, 1990 and overruled August 22, 1990. A motion

to reconsider on the basis that the trial court did not address any of the issues raised in the April 9, 1990 supplemental motion was overruled and appeal followed petitioner's plea of no contest thereby preserving the constitutional issue.

On January 2, 1991, petitioner herein appealed to the Ninth District Court of Appeals of Ohio and stated verbatim in Assignment of Error No. 1:

> Ohio Revised Code Section 4511.19 (A)(3) was and is being applied in a discriminatory manner, is discriminatory in its application, and contravenes the Fourteenth Amendment to the United States Constitution.

On June 5, 1991, the Ninth District Court of Appeals of Ohio rendered a decision overruling petitioner's assignment of error. The Appellate Court manufactured an issue, irrelevant to the constitutional issue proposed, upon which it issued its decision.

On July 23, 1991, petitioner filed his memorandum in support of jurisdiction and was assigned Case Number 91-1483 in the Ohio Supreme Court. Proposition of Law II advanced to the Ohio Supreme Court was that the trial court "erred in not finding that Ohio Revised Code Section 4511.19(A)(3) is discriminatory in its application and contravenes the Fourteenth Amendment to the United States Constitution..."

At no time did <u>any</u> court address the constitutional issues presented for adjudication.

REASONS FOR GRANTING THE WRIT

1. The decisions below conflict with provisions of the Fourteenth Amendment to the United States Constitution.

There has been an intentional or purposeful discrimination on the part of the State of Ohio against the classes enumerated in the Statement of the Case. The officials of the State of Ohio are applying the breath testing per se statute differently to classes of people who should be treated alike in that the machines used are capable in the present state of the art of adjusting or being adjusted to fit the varying physiologies and situations of the individuals being tested.

2. The State courts violated the Due Process Clause of the Fourteenth Amendment by <u>never</u> addressing the constitutional arguments clearly propounded at all levels.

CONCLUSION

The State of Ohio has deprived the petitioner of his liberty without due process of law by refusing to recognize his consistent and cogent claim that the methods being used by the State of Ohio to administer breath tests were in violation of the Fourteenth Amendment Equal Protection Clause.

The Fourteenth Amendment Equal Protection argument remains an issue to which the petitioner is entitled to an adjudication.

Respectfully submitted,

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(216) 769-4901

Counsel for Petitioner

APPENDIX

The Supreme Court of Ohio

1991 TERM

To wit:

October 23, 1991

State of Ohio Appellee,	:	Case No. 91-1483
v.	:	E N T R Y
Steven Gnatovich, Appellant.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Medina County to certify it record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Robert G. Schultz.

(Court of Appeals No. 1970)

/s/ THOMAS J. MOYER
Chief Justice

I HEREBY CERTIFY that this document is a true and accurate copy of the entry of the Supreme Court of Ohio dated October 23, 1991 in Supreme Court case number 91-1483.

In witness whereof I have hereunto subscribed my name and affixed the seal of the Supreme Court of Ohio on this 18th day of November, 1991.

MARCIA J. MENGEL, Clerk,

/s/ by Rita A. Nash, Deputy.

IN THE WADSWORTH MUNICIPAL COURT

WADSWORTH, OHIO

THE STATE OF OHIO,

Plaintiff

-vs-

STEVEN GNATOVICH,

Defendant.

Journal Entry

Case No. 90TRC447-2

Before the Court is the Defendant's motion to dismiss. The basis of the motion is that O.R.C. Section 4511.19 (A)(3) is unconstitutionally vague. The argument is that the law does not give a person of ordinary intelligence notice of what conduct is prohibited by the statute.

This issue has been addressed before. The leading case is State v. Tanner, (1984), 15 Ohio St. 3d 1. In that case, the Supreme Court unanimously held that O.R.C. Section 4511.19(A)(2) was not unconstitutionally vague; not unconstitutionally overbroad; and did not give

rise to a conclusive presumption of guilt.

Although Tanner dealt with a prosecution under O.R.C. Section 4511.19 (A)(2), other courts have reached the same result in motions filed in prosecutions under O.R.C. Section 4511.19 (A)(3). State v. Wilcox, (1983), 10 Ohio App. 3d 11; Oregon v. Lemons, (1984), 17 Ohio App. 3d 195; and State v. Evans, (1985), 21 Ohio App. 3d 169.

Therefore, this Court finds that the Defendant's motion is not well taken and hereby overrules his motion to dismiss the charge of violation of O.R.C. section 4511.19 (A)(3).

S O O R D E R E D.

/s/ James L. Kimbler, Judge

CLERK

1990 AUG-2 PM 12:35

WADSWORTH MUNICIPAL COURT

STATE OF OHIO COUNTY OF MEDINA	)) ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT

STATE OF OHIO Plaintiff-Appellee v. STEVEN GNATOVICH Defendant-Appellant	)))))))))	C.A. NO. 1970 APPEAL FROM JUDGMENT ENTERED IN THE WADSWORTH MUNICIPAL COURT OF THE COUNTY OF MEDINA, OHIO CASE NO. 90 TRC 447-2

DECISION AND JOURNAL ENTRY

Dated: June 5, 1991

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

COOK, J. Defendant Steven Gnatovich appeals his conviction of operating a motor vehicle with a prohibited concentration of alcohol in violation of R.C. 4511.19(A)(3). We affirm.

Defendant was arrested on February 5, 1990 while operating his automobile in Harrisville Township, Medina County. On February 12, 1990, defendant entered a plea of not guilty in the Wadsworth Municipal Court. On March 1, 1990, defense counsel filed a motion to dismiss the charge challenging the constitutionality of R.C. 4511.19(A)(3).

On June 27, 1990, the trial court conducted a hearing on the motion to dismiss and on August 22, 1990 issued an order overruling defendant's motion. Defendant then filed a motion for discharge pursuant to R.C. 2937.21, on August 17, 1990. This motion was also overruled by the trial court. On September 11, 1990, defendant filed a withdrawal of his jury demand and a notice of an intent to change his plea.

On the day prior to trial, defendant

submitted his second written waiver of a jury trial. At trial on November 1, 1990, defendant changed his plea to no contest and was found guilty.

After receiving a stay of the execution of sentence, defendant filed this appeal.

Assignment of Error I

> "Ohio Revised Code Section 4511.19(A)(3) was and is being applied in a discriminiatory manner, is discriminatory in its application, and contravenes the Fourteenth Amendment to the United States Constitution.

Defendant, a male, challenges the constitutionality of R.C. 4511.19(A)(3) on the grounds that it is discriminatorily applied against women. The constitutionality of a statute may not be questioned by one who is not an injured member of the class against whom the statute is alleged to have been unconstitutinally applied. Palazzi v. Estate of

Gardner (1987), 32 Ohio St. 3d 169; State v. Jacobs (May 15, 1991), Summit App. No. 14881, unreported, at 7, fn. 2.

Furthermore, Ohio appellate courts have upheld the constitutionality of R.C. 4511.19(A)(3). State v. Evans (1985), 21 Ohio App. 3d 169; State v. Wilcox (1983), 10 Ohio App. 3d 11; see also, State v. Tanner (1984), 15 Ohio St. 3d 1 (upholding the constitutionality of R.C. 4511.19(A)(2)).

Accordingly, defendant's first assignment of error is overruled. . . .

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Medina, Wadsworth Municipal Court to carry this judgment into execution. A certified copy of this journal entry

shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exception.

/s/ DEBORAH COOK
FOR THE COURT

QUILLIN, P.J.
BAIRD, J.
CONCUR

APPEARANCES:

NORMAN BRAGUE, Law Director, 145 High St., Wadsworth, OH 44281 for Plaintiff.
ROBERT G. SCHULTZ, JR., Attorney at Law, 123 B Greenwich Rd., Seville, O 44273 for Defendant.

COURT OF APPEALS

91 JUN-5 PM 12:37

FILED
JEAN WATERS
MEDINA COUNTY
CLERK OF COURTS

IN THE WADSWORTH MUNICIPAL COURT
WADSWORTH, OHIO

STATE OF OHIO

Plaintiff

vs. CASE NO.
90 TRC 447 (B)

STEVEN GNATOVICH

Defendant

SUPPLEMENT TO MOTION TO DISMISS

Now comes the Defendant and supplements his motion to hold the per se offense of driving with a prohibited blood or breath alcohol level unconstitutional.

He incorporates the memorandum and exhibits previously filed as fully as if herein rewritten and adds to his grounds for dismissal the following:

The information available to the public indicating the correlation between alcohol consumption, time, and body weight is discriminatory to such a degree

that a person of ordinary intelligence cannot know what is considered by the statute as excessive drinking.

The law does not limit driving, nor does it prohibit drinking alcohol and driving.

The scientific fact to be supported by expert medical and technological evidence is that O.R.C. 4511.19(A)(2) and 4511.19(A)(3) and 4511.19(A)(4) are applied in a discriminatory manner based on the varying physiologies of the persons against which the statutes are sought to be enforced and upon the anomalies of the breath testing devices used to enforce O.R.C. 4511.19(A)(3) which seek to use a tertiary method to resolve the effect of alcohol on the brain by virtue of an artificial standard.

It is well known that the breath/blood ratios in the population can vary from 800/1 to 7000/1, that cardio-pulmonary factors are involved and not compensated for in the machine testing, that persons with a fever will test up to 30 per cent higher on a BAC than those without, that the intoxilyzer measures lacquers and solvents, among other things, in the .038 micron range, that men have a greater per cent of body fluids than women, thereby creating differing breath and blood levels for persons of the same weight taking identical timed doses thereby unfairly discriminating against women. (See chart in St. v. Tanner, 15 Ohio St 3d 1). Also denture users are discriminated against because the Department of Health standards do not prescribe removal of

same for twenty minutes prior to the test using breath testing devices. There is no provision for taking two separate tests to determine whether the breath alcohol level is ascending or descending from the time of driving, no provision is made for the taking of the subject's temperature prior to testing.

The legislature has attempted to rewrite the laws of nature by ignoring the gap between the physiology of the measurement of alcohol and the instrument technology. It further has neglected to incorporate procedural and substantive safeguards against discriminatory and fallacious measuring techniques by refusing to recognize scientific reality, to wit:

1. Two breath sample testing.

2. Removal of dentures twenty minutes before testing.

3. No provision made for taking of body temperature during the twenty minute observation period.

4. No provision has been made to insure against intoxilyzer test result error due to subject's prior exposure to lacquer, paint thinner, and other organic solvent vapors.

5. The partition rate assumed by breath testing machine manufacturers and the legislature to be 2100/1 is patently unfair to members of the public having ratios of 800/1 to 2050/1 and flies in the face of scientific fact.

6. Women are being discriminated against due to the fact that men have more bodily fluid per pound than do women thereby building discriminatory error into

the Ohio Department of Safety's publication concerning the relationship between ounces of alcohol and body weight.

7. The condensation effect, breath temperature, gas distribution in the lungs, breathing patterns, and the partition ratio, all scientifically known to affect breath testing devices causing error in estimating blood alcohol levels, have been ignored by the breath testing technology that has been implemented by the legislature as scientific fact.

In summary, this Defendant is alleging and is adducing evidence to indicate that O.R.C. 4511.19(A)(3) has been, is, and will continue to be applied in a discriminatory manner unless it is found to be unconstitutional. O.R.C. 4511.19 (A)(3), the Ohio per se breath/alcohol offense, is discriminatory in its application and contravenes the Fourteenth

Amendment to the United States

Constitution.

/s/ Robert G. Schultz, Jr.
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CLERK

1990 APR-9 AM 11:45

WADSWORTH MUNICIPAL
COURT

IN THE WADSWORTH MUNICIPAL COURT

WADSWORTH, OHIO

THE STATE OF OHIO,

Plaintiff,

vs. CASE NO. 90TRC447-2

STEVEN GNATOVICH,

Defendant.

MOTION TO RECONSIDER

Now comes the Defendant and moves the Court to reconsider its decision or, in the alternative, to withdraw its findings and rewrite the opinion. The Defendant further moves the Court for leave to file objections to the test results on the BAC Verifier.

MEMORANDUM

The true basis of the motion as amended on April 9, 1990 is that O.R.C. 4511.19(A)(3) is being applied in a discriminatory manner and is violative of

the equal protection proscription against such discrimination. The journal entry filed by the Court on August 2, 1990 does not address any of the issues raised in the amended or supplemented motion to dismiss, i.e., discriminatory application. The leave to file a motion to dismiss the BAC Verifier result should be granted in the interest of fair play.

/s/ Robert G. Schultz, Jr.
Attorney for Steven Gnatovich

CLERK

1990 AUG -9 AM 10:40

WADSWORTH MUNICIPAL
COURT

NINTH DISTRICT COURT OF APPEALS

STATE OF OHIO	CASE NO. 1970
Plaintiff-Appellee	Appeal from Wadsworth Municipal Court Case No. 90TRC00447-2
vs.	
STEVEN GNATOVICH	
Defendant-Appellant	

BRIEF OF APPELLANT

Assignment of Error I

Ohio Revised Code Section 4511.19 (A)(3) was and is being applied in a discriminatory manner, is discriminatory in its application, and contravenes the Fourteenth Amendment to the United States Constitution.

ARGUMENT

Assignment of Error No. 1

The scientific fact, supported by expert medical and technological evidence, is that O.R.C. 4511.19(A)(3) is

applied in a discriminatory manner based on the varying physiologies of the persons against which the statute is sought to be enforced and upon the anomalies of the breath testing devices used to enforce O.R.C. 4511.19(A)(3) which seek to use a tertiary method to resolve the effect of alcohol on the brain by virtue of an artificial standard.

It is well known that the breath/blood ratios in the population can vary from 800/1 to 7000/1, that cardio-pulmonary factors are involved and not compensated for in the machine testing, that persons with a fever will test up to 30 per cent higher on a BAC than those without, that the intoxilyzer measures lacquers and solvents, among other things, in the .038 micron range, that men have a greater per cent of body fluids than women, thereby creating differ-

ing breath and blood levels for persons of the same weight taking identical timed does thereby unfairly-discriminating against women. Also denture users are discriminated against because the Department of Health standards do not prescribe removal of same for twenty minutes prior to the test using breath testing devices. There is no provision for taking two separate tests to determine whether the breath alcohol level is ascending or descending from the time of driving, no provision is make for the taking of the subject's temperature prior to testing.

The legislature has attempted to rewrite the laws of nature by ignoring the gap between the physiology of the measurement of alcohol and the instrument technology. It further has neglected to incorporate procedural and substantive safeguards against discriminatory and

fallacious measuring techniques by refusing to recognize scientific reality, to wit:

1. Two-breath sample testing.

2. Removal of dentures twenty minutes before testing.

3. No provision made for taking of body temperature during the twenty-minute observation period.

4. No provision has been made to insure against intoxilyzer test result error due to subject's prior exposure to lacquer, paint thinner, and other organic solvent vapors.

5. The partition rate assumed by breath testing machine manufacturers and the legislature to be 2100/1 is patently unfair to members of the public having ratios of 800/1 to 2050/1 and flies in the face of known scientific fact.

6. Women are being discriminated

against due to the fact that men have more bodily fluid per pound than do women thereby building discriminatory error into the Ohio Department of Safety's publication concerning the relationship between ounces of alcohol and body weight.

7. The condensation effect, body temperature, gas distribution in the lungs, breathing patterns, and the partition ratio, all scientifically known to affect breath testing devices causing error in estimating blood alcohol levels, have been ignored by the breath testing technology that has been implemented by the legislature as scientific fact.

This Defendant is alleging and has adduced evidence to indicate that O.R.C. 4511.19(A)(3) has been, is, and will continue to be applied in a discriminatory manner unless it is found to be unconstitutional. O.R.C. 4511.19(A)(3), the Ohio

per se breath/alcohol offense, is discriminatory in its application and contravenes the Fourteenth Amendment to the United States Constitution...

/s/ Robert G. Schultz Jr.
Counsel for Appellant

COURT OF APPEALS

91 JAN-2 PM 3:30

FILED
JEAN WATERS
MEDINA COUNTY
CLERK OF COURTS

IN THE SUPREME COURT OF OHIO
APPEAL FROM THE COURT OF APPEALS
OF MEDINA COUNTY, OHIO
NINTH APPELLATE DISTRICT

CASE NO. 1970

SUPREME COURT CASE NO: 91-1483

STEVEN GNATOVICH

Defendant - Appellant

-vs-

STATE OF OHIO

Plaintiff - Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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PROPOSITION OF LAW II

The trial court erred in not finding that O.R.C. 4511.19(A)(3) is discriminatory in its application and contravenes the Fourteenth Amendment to the United States Constitution, a ground specifically left open by State v. Tanner, 15 Ohio St. 3d 1.

FILED

JUL 23 91

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

OHIO ADMINISTRATIVE CODE; CHAPTER 3701-53

3701-53-01 TECHNIQUES OR METHODS

(A) Tests to determine the concentration of alcohol to blood, urine, breath, or other bodily substances. Results shall be expressed as equivalent to:

(1) Percent by weight in blood (grams per 100 milliliters of blood);

(2) grams by weight of alcohol per two hundred ten liters of deep lung breath;

(3) Grams by weight of alcohol per one hundred milliliters of urine (grams percent by weight).

The results of the tests shall be identified and retained for not less than three years.

(B) At least one copy of the following written methods or techniques for performing tests in use under paragraph (A) of this rule shall be on file in the

area where the analytical tests are performed:

(1) In the case of a breath testing instrument, the operational manual provided by the instrument's manufacturer; or

(2) In the case of blood, urine and other bodily substance, tests approved under rule 3701-53-03 of the Administrative Code, the pertinent literature or analyzer or kit instructions, as cited in that rule.

Effective 01/01/87; prior effective date 06/13/83.

3701-53-02 BREATH TESTS

(A) The breath testing instruments listed in this paragraph are approved as evidential breath testing instruments. In addition to any other purposes for which they may be used, evidential breath testing instruments are approved for use

in determining whether an individual's breath contains a concentration of alcohol prohibited or defined by division (A)(3) of section 4511.19, division (A)(4) of section 1547.11, division (B) of section 2903.06, division (B) of section 2903.07 of the Revised Code, or any other statute or local ordinance prescribing a defined or prohibited breath alcohol concentration. The approved evidential instruments are:

(1) Breathalyzer: model numbers 900, 900A;

(2) Intoxilyzer: model numbers 4011, 4011A, 4011AS, 4011ASA;

(3) CMI Intoxilyzer model number 5000;

(4) Alco-Sensor RBT III;

(5) BAC Verifier;

(6) National Patent BAC DataMaster; and

(7) National Draeger Alcotest 7110.

(B) Breath samples of deep lung (alveolar) air shall be analyzed for purposes of determining whether a person has a prohibited breath alcohol concentration with instruments approved under paragraph (A) of this rule. Breath samples shall by analyzed according to the operational checklist for the instrument being used, as set forth in appendices A to G to this rule. Checklist forms recording the results of subject tests shall be identified and retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

(C) A radio frequency interference (RFI) survey shall be performed by a senior operator for each breath testing instrument lised in paragraphs (A)(1) to

(A)(3) and (A)(5) to (A)(7) of this rule that is in operation at each breath testing site. RFI surveys are not required for the instrument listed in paragraph (A)(4) of this rule. RFI surveys performed on and after the effective date of this amendment shall be performed in accordance with the instructions on the form set forth in appendix H to this rule. RFI surveys conducted before the effective date of this amendment in accordance with this rule as it existed when the surveys were conducted shall remain valid until an event that would require a new RFI survey under paragraph (C)(2) of this rule occurs.

(1) Radio transmitting antennae shall not be used within any RFI affected zone during the conduct of a subject test or a calibration check. No radio transmitting antennae that have not been

subjected to an RFI survey shall be used within thirty feet of the breath testing instrument during conduct of a subject test or a calibration check.

(2) A new RFI survey shall be conducted when:

(a) the location of the breath testing instrument, when used for testing,is moved more than one foot in any direction;

(b) the instrument's axis is changed;

(c) the frequency band of the radio transmitting equipment, as defined by the chart set forth in this paragraph, is changed;

RADIO FREQUENCY BANDS

HF	3 to 30 megahertz
VHF	30 to 300 megahertz
UHF	300 to 3000 megahertz

(d) the radio transmitting

equipment's rated output power is changed;

(e) any electronic component of the instrument is changed, other than replacement of parts with original equipment replacement parts or factory authorized replacement parts meeting the same specifications as the original equipment parts; or

(f) a new breath testing instrument is placed into service.

(3) The original RFI survey form and any subsequent RFI survey forms shall be kept on file in the area where tests are performed.

(D) The breath testing instruments listed in this paragraph are approved as nonevidential preliminary breath testing instruments. These instruments are not approved for use in determining whether an individual's breath contains

a concentration of alcohol prohibited or defined by division (A)(3) of section 4511.19, division (A)(4) of section 1547.11, division (B) of section 2903.06, division (B) of section 2903.07 of the Revised Code, and any other statute or local ordinance prescribing a defined or prohibited breath alcohol concentration. The approved preliminary breath testing instruments are:

(1) "Alco-Sensor" (two digit display model); and

(2) "Alco-Sensor" (pass, warn, fail light display model).

Effective 05/05/90; prior effective date 01/01/87.

3701-53-03 BLOOD, URINE AND BODILY SUBSTANCE TESTS

The following techniques or methods for determining the concentration of alcohol in blood, urine and other bodily

substances are approved:

(A) The following direct distillation method:

"Shupe and Dubowski, Am. J. Clin. Path., 22:901, 1952."

(B) Gas Chromatograph methods, using a gas chromatograph which has satisfactory accuracy, precision and sensitivity and a suitable column for direct injection or head-space gas chromatography for ethyl alcohol.

(C) Enzymatic methods as follows:

(1) "Stiles, et al, Am. J. of Clin. Path., 46:608, 1966";

(2) "Bonnichsen and Theorell, Scand. J. Clin. and Lab. Invest., 3:58, 1951";

(3) "Buecher and Redetzki, Klinische Wochenschrift, 29:615, 1951";

(4) "Bonnichsen and Lundgren, J. Acta. Pharmacol. Toxicol., 13:256, 1957."

(D) Analyzers and kits, as follows:

(1) "CalBiochem-Behring, Ethyl Alcohol Kit";

(2) "Dupont ACA Instrument," using "Ethyl Alcohol (ALC) Kit";

(3) "Sigma Diagnostics, Alcohol (Ethanol) Kit";

(4) "Abbott TDx Analyzer."

Effective 05/05/90; prior effective date 01/01/87.

3701-53-04 CALIBRATION

(A) Approved evidential breath testing instruments shall be checked for calibration no less frequently than once every seven days by a senior operator using a solution of ethyl alcohol approved by the director of health and using the calibration checklist for the instrument being checked, as set forth in appendices A to G to this rule.

(1) A calibration check of a

breath testing instrument is valid when the result of the calibration check is at target value plus or minus five one-thousandths (0.005) grams per two hundred ten liters. The results of a calibration check shall be recorded on a calibration checklist. A calibration solution shall not be used more than three months after its date of first use. The date of first use for the calibration solution and its identification data shall be recorded on the calibration checklist used for that calibration check.

(2) Results of a calibration check which are outside the range specified in paragraph (A)(1) of this rule shall be confirmed by the senior operator using another bottle of calibration solution, which may be from any approved lot. If this calibration check also is out of the range, the instrument shall be taken

out of service until the problem has been corrected.

(3) A calibration check shall be made when a new breath testing instrument is set in place or when an instrument is returned to service after mechanical or electronic repairs before the instrument is used to test subjects;

(4) Calibration solutions shall be stored in the container in which the solutions were placed by their manufacturer and shall be kept under refrigeration after first use, when not being used.

(B) Distillation, enzymatic, and gas chromatographic methods, techniques, instruments, and kits shall be calibrated with a known concentration of ethyl alcohol each day tests are run by the laboratory director or under his or her general direction by a laboratory technician. General direction does not mean that the

laboratory director must be physically present during the conduct of the calibration.

(C) Results of calibration checks and records of calibration, maintenance and repairs shall be identified and retained, in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

Effective 05/05/90; prior effective date 01/01/87.

3701-53-05 COLLECTION AND HANDLING OF BLOOD AND URINE SPECIMENS

(A) All samples shall be collected in accordance with division (B) of section 4511.19 or division (B) of section 1547.11 of the Revised Code, as applicable.

(B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. Alcohol shall not be used as a skin antiseptic.

(C) Blood shall be drawn with a:

(1) Sterile dry needle into a vacuum container containing a solid anti coagulant; or

(2) sterile dry needle and syringe and deposited into a clean container containing a solid anticoagulant and the container shall then be capped or stoppered.

(D) Urine shall be deposited into a clean glass or plastic screw top container which shall be capped. The individual who collects the urine sample shall add one "Cambridge Chemical Products Sodium Flouride-Thymol (SFT)" tablet to the sample at the time of collection and shall record that the tablet was added. The collection of a urine specimen must be witnessed to assure that the sample can be authenticated.

(E) Blood and urine containers shall be sealed with a gummed tape or sticker which contains at least the following information:

(1) Name of suspect;

(2) date and time of collection;

(3) name or initials of person collecting and/or sealing sample.

(F) While not in transit to a laboratory or under examination all urine and blood specimens shall be refrigerated at a temperature of forty-two (42) degrees Fahrenheit or below.

Effective 05/05/90; prior effective date 01/01/87.

3701-53-06 LABORATORY QUARTERS FOR BLOOD, URINE, AND OTHER BODILY SUBSTANCE TESTS

Tests shall be performed in a room with adequate space, workbench area, lighting and ventilation. The testing

area shall be convenient to a sink, water, and electricity or gas, as needed.

Effective 03/01/68.

3701-53-07 QUALIFICATIONS OF PERSONNEL

(A) Blood, urine, and bodily substance tests shall be performed in a laboratory by a person who has a laboratory director's permit or, under his or her general direction, by a person who has a laboratory technician's permit. General direction does not mean that the laboratory director must be physically present during the conduct of the test.

(1) A person who has completed satisfactorily a proficiency examination administered under rule 3701-53-08 of the Administrative Code for the approved technique or method of analysis for which the permit is sought and who possesses a minimum of a bachelor's degree which includes at least two academic years of

college chemistry and at least two years of experience in a clinical or chemical laboratory meets the qualifications for a laboratory director's permit.

(2) A person who has completed satisfactorily a proficiency examination administered under rule 3701-53-08 of the Administrative Code for the approved technique or method of analysis for which the permit is sought and who meets the qualifications prescribed in appendix A to this rule (42 C.F.R. 405.1315[e]) meets the qualifications for a laboratory technician's permit.

(B) Breath tests used to determine whether an individual's breath contains a concentration of alcohol prohibited or defined by division (A)(3) of section 4511.19, division (A)(4) of section 1547.11, division (B) of section 2903.06, division (B) of section 2903.07 of the

Revised Code, or any other statute or local ordinance prescribing a defined prohibited breath alcohol concentration shall be performed by a senior operator or an operator who is under the general direction of a senior operator. General direction does not mean that the senior operator must be physically present during the conduct of the test. A senior operator shall be responsible for the care, maintenance, and calibration of the evidential breath testing instruments.

(C) A person meets the qualifications for a senior operator's permit by:

(1) Being a high school graduate or having passed the "General Education Development Test"; and

(2) Having demonstrated that he or she can properly care for, maintain, perform calibration checks upon, and operate the evidential breath testing

instrument for which a permit is sought by having satisfactorily completed a basic senior operator training course (or, if appropriate, an upgrade or a conversion course) meeting the requirements set forth in appendix B to this rule for the type of approved evidential breath testing instrument for which he or she seeks a permit.

(D) A person meets the qualifications for an operator's permit by:

(1) Being a high school graduate or having passed the "General Education Development Test"; and

(2) Having demonstrated that he or she can properly operate the evidential breath testing instrument for which a permit is sought by having satisfactorily completed a basic operator training course (or, if appropriate, a conversion course) meeting the requirements set forth in appendix B to this rule for the type of

approved evidential breath testing instrument for which he or she seeks a permit.

Effective 05/05/90; prior effective date 01/01/87.

3701-53-08 SURVEYS AND PROFICIENCY EXAMINATIONS

(A) Persons who apply for or are issued permits under rule 3701-53-09 of the Administrative Code shall be subject to surveys and proficiency examinations by representatives of the director of health. A survey or proficiency examination may be conducted whenever it is considered necessary.

(1) A survey shall consist of an on site review of the permit holder's or applicant's compliance with the requirements of this chapter.

(2) A proficiency examination shall consist of an evaluation of the

permit holder's or applicant's ability to test samples provided by a representative of the director using the instrument, technique, or method for which the permit is held or sought. Proficiency examination samples may be:

(a) mailed to the facility at which the permit holder or applicant uses or plans to use the permit; or

(b) presented to the permit holder or applicant in person by a representative of the director at a testing site.

(B) During proficiency examinations, permit holders and applicants shall accept samples, perform tests, and report the results of the tests to a representative of the director. During surveys, permit holders and applicants shall permit the director's representatives to have access to all portions of the facility where the

permit is used or intended to be used and to all records relevant to compliance with the requirements of this chapter.

Effective 05/05/90; prior effective date 03/01/68.

3701-53-09 PERMITS.

(A) Persons desiring to function as laboratory directors, laboratory technicians, senior operators and operators shall apply to the director of health for individual permits on forms prescribed and and provided by the director. A separate application shall be filed for each breath testing instrument or laboratory technique or method for which a permit is sought.

(B) The director shall issue appropriate permits to perform tests to determine the amount of alcohol in a person's blood, breath, urine, or other bodily substance to persons who qualify under the

applicable provisions of rule 3701-53-07 of the Administrative Code or under paragraph (D) of this rule. Individuals holding permits issued under this rule shall use only those laboratory techniques or methods or evidential breath testing instruments for which they have been issued permits.

(C) Permits issued under paragraph (B) of this rule shall expire two years from the date issued, unless revoked prior to the expiration date. A person holding a permit may seek issuance of a new permit by the director of health under paragraph (B) of this rule by filing an application with the director in accordance with paragraph (A) of this rule no sooner than six months before the expiration date of the current permit. The director shall not issue a new permit if the permit holder is in proceed-

ings for revocation of his or her current permit under rule 3701-53-10 of the Administrative Code.

(D) To qualify for issuance of a new permit under paragraph (B) and (C) of this rule:

(1) A permit holder shall present evidence satisfactory to the director that he or she continues to meet the qualifications established by the applicable provisions of rule 3701-53-07 of the Administrative Code for issuance of the type of permit sought.

(2) If the person seeking a new permit currently holds a laboratory technician or laboratory director permit, the permit holder shall have completed satisfactorily a proficiency examination for the applicable technique or method conducted under rule 3701-53-08 of the Administrative Code subsequent to the

date of issuance of the current permit.

(3) If the person seeking a new permit currently holds an operator or senior operator permit, the permit holder shall have completed satisfactorily an in-service course for the applicable type of evidential breath testing instrument which meets the requirements of appendix B to rule 3701-53-07 of the Administrative Code and which includes review of self study materials furnished by the director.

Effective 05/05/90; prior effective date 01/01/87.

3701-53-10 REVOCATION AND DENIAL OF PERMITS

(A) The director of health may deny or revoke the permit of any permit holder or person seeking a permit:

(1) Who obtains or seeks to obtain a permit falsely or deceitfully;

(2) Who fails to comply with any of the provisions of rules 3701-53-01 to 3701-53-09 of the Administrative Code; or

(3) Who:

(a) As an operator, fails to demonstrate that he or she can properly operate the breath testing instrument for which the permit is held;

(b) As a senior operator, fails to demonstrate that he or she can properly care for, maintain, perform calibration checks upon, and operate the breath testing instrument for which the permit is held; or

(c) As a laboratory director or laboratory technician, fails to demonstrate that he or she can properly perform the technique or method of analysis for which the permit is held.

(B) A permit holder whose permit is revoked under this rule may not reapply

for that permit for three months after the date the revocation becomes effective.

Effective 05/05/90; prior effective date 01/01/87.